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If It Looks Like a Duck

Traditional Public Forum Status of Open Areas on Public University Campuses

by NATHAN W. KELLUM¹

I. Introduction

As the oft-used and oft-quoted maxim for assessing the obvious goes: “If it looks like a duck, walks like a duck, and quacks like a duck, it just may be a duck.”² The notion behind this quote is an irrefutable adage, but one that is seemingly lost on many public university administrators today who struggle to either discern or acknowledge the obvious, that being, the traditional public forum status of open areas on campus.

This difficulty with the obvious comes at a high cost. Would-be speakers, both students and non-students alike, are deprived of fundamental First Amendment freedoms in areas that represent traditional public fora on campus. In essence, these universities set themselves up as speech dictators, granting preferential treatment to state-sanctioned speech, while severely restricting out-of-favor expression in areas that would otherwise be suitable for speech purposes. Although public universities that engage in such efforts are rather diverse in their respective creations of policies pertaining to speech, these universities are remarkably uniform in exercising control over speech on campus. University administrators claim speech on campus to be subject to their ownership of the property, and with this self-professed authority, what they say goes, all under the guise of so-called “reasonable” speech restrictions.³ Permit requirements are routine,⁴ as are *ad hoc* decisions about the propriety

1. Senior Legal Counsel, Alliance Defense Fund. Mr. Kellum wishes to thank Jon Scruggs for his invaluable contribution to this article.

2. This is a quote attributed to Walter Reuther, a labor leader in the 1930s, on how to spot a communist.

3. The “reasonableness” standard is a test that applies in nonpublic fora, a relatively low standard to meet. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 682-83 (1998).

4. For example, University of Arkansas at Fayetteville mandates prior permission to speak

of speech.⁵ Speech zones are commonly enforced, requiring certain speakers to express their message on undesirable portions of the campus.⁶ And, in some instances, the right to speak on campus is jettisoned altogether.⁷

Notwithstanding this common stance and the arrogance by which it is communicated, the position adopted by many public universities today runs afoul of well-established First Amendment principles. Speech in a traditional public forum is supposed to receive the utmost constitutional protection,⁸ whether the expression is found off campus or on it. Unless a given public university can demonstrate sufficient reason why open areas on campus should not fall under this classification, the traditional public fora standard controls the analysis and the level of protection afforded the speech.⁹

However, at the present time, there is a surprising dearth of direct precedent on this issue.¹⁰ Conveniently filling the void,

on campus grounds. Non-university entities are required to obtain permission no less than three days prior to speaking, and only five such reservations may be made each semester. The university expressly reserves the right to disapprove the request of any entity failing to comply with university policy, or state or federal law. Fayetteville Policies and Procedures, 708.0, available at <http://www.uark.edu/admin/vcfainfo/policyprocedures/7080.pdf>.

5. Typically, this involves university officials utilizing discretion in deciding whether certain speech is appropriate on campus. See, e.g., *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 585 (S.D. Tex. 2003).

6. Speech zones concern arbitrary decisions about where speech can be conveyed on a college campus. E.g., *Roberts v. Haragan*, 346 F. Supp. 2d 853, 864 (N.D. Tex. 2004) (speech zone at Texas Tech University). See Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 481 n. 2 (2005) (discussing challenges to "speech zones" at various institutions); see generally Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L. J. 267 (2004) (addressing constitutional parameters of "speech zones" on college campuses).

7. This is precisely how the University of Texas at Arlington treats speakers outside of their college community. *Bourgault v. Yudof*, 316 F. Supp. 2d 411, 413-14 (N.D. Tex. 2004).

8. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

9. The level of protection given to expression in this type of forum is significant. In a traditional public forum, any restriction on speech must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of expression, to survive scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

10. Until recently, no appellate court had ever directly dealt with this issue. While this author was in the process of completing this article, the Fourth Circuit Court of Appeals rendered its decision in *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005), in which, the appellate court held outdoor areas on College Park campus at the University of Maryland not to be traditional public fora. *Id.* at 444. The precedential value of this decision is questionable however. The analysis provided in *Mote* is regrettably shallow and appears to be fact-specific. Nevertheless, as demonstrated herein, the ruling deviates

university officials promulgate their own rule of law, an arbitrary system that pays little attention to free speech concerns. For reasons described more fully herein, this article will demonstrate the error of the typical university mindset, highlighting the Supreme Court and pertinent appellate court rulings that flatly contradict the commonly held position regarding speech on university campuses. In the absence of a Supreme Court ruling directly on point,¹¹ this precedent is gleaned from a variety of sources that are to be read as a whole.¹² Much like a jigsaw puzzle, individual case holdings provide little meaning, but taken as a whole, unmistakable legal precedent paints a clear picture and points to the undeniable conclusion that open areas on a public university campus classify as traditional public fora.

We will endeavor, in this article, to put the pieces together. For once prevailing authority is properly recognized, speech on campus should finally receive the constitutional protection it so richly deserves.

II. Benefits of Being Traditional

The extent to which protected speech can be validly regulated depends in large part on the forum employed and its classification.¹³ In a "traditional public forum," speakers enjoy the highest level of constitutional protection.¹⁴ Under this classification, restrictions on speech are subject to a higher standard than that imposed in either a limited public forum or a nonpublic forum.¹⁵ The traditional public forum and all of forum analysis had its inception in 1939, in the case

from Supreme Court holdings and current trends among other appellate circuits.

11. To date, there is no Supreme Court ruling analyzing the issue described herein. Even decisions in lower courts are sparse. In fact, aside from the recent holding of *Mote*, there is only one reported decision, *Bourgault*, *supra*, that addresses the matter. And the *Bourgault* ruling is prone to modification as an appeal is pending.

12. The precedent is primarily derived from the Supreme Court, but relevant appellate court rulings provide needed clarification on the matter.

13. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). In *Frisby*, groups of eleven to forty individuals picketed the residence of a local abortion doctor on six different occasions, for periods of time ranging from one to one and a half hours. The picketing was peaceful and orderly; the city had no occasion to invoke any existing ordinance concerning noise or disorderly conduct. *Id.* at 476-77. The town then enacted a new ordinance prohibiting all picketing in residential neighborhoods, except for labor picketing. After being advised by an attorney that the ordinance violated the Equal Protection clause, the town enacted a flat ban on all picketing in residential neighborhoods. *Id.* at 477. The Supreme Court held the streets in question to be traditional public fora, and the ban content-neutral. *Id.* at 487-88.

14. Indeed, "almost unfettered access." *Forbes*, 523 U.S. at 679.

15. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

of *Hague v. Committee for Industrial Organization*,¹⁶ when the United States Supreme Court struck down a city ordinance that made the leasing of public property contingent on police commissioner approval.¹⁷ Speaking for the majority, Justice Butler declared that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹⁸

From this rather vague verbiage, the Supreme Court constructed modern categories of forum analysis, many years later, in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹⁹ In *Perry*, the Court ruled that the government could bar a union from accessing an inter-school mail system on the general basis that the “right of access to public property and the standard by which limitations upon such a right must be evaluated differ *depending on the character of the property at issue*.”²⁰ Thereby, the Supreme Court tied the allowance of free speech to the location or “forum” where the speech occurs,²¹ and proceeded to enumerate three types of governmentally-owned fora: 1) traditional public forum which “by long tradition or by government fiat have been devoted to assembly and debate;”²² 2) designated public forum which “the State has opened for use by the public as a place for expressive activity;”²³ and 3) nonpublic forum “which is not by tradition or designation a forum for public communication.”²⁴ Though labels, these characterizations prove vitally important in current jurisprudence because governmental regulations impacting speech are scrutinized in strict accordance with these forum categories.²⁵

16. 307 U.S. 496 (1939).

17. *Id.* at 515-16. The unfettered discretion employed by the police commissioner resulted in the prevention of distribution of pamphlets on city streets. *Id.* at 516.

18. *Id.* at 515.

19. 460 U.S. at 44-45. For an extensive discussion of public forum doctrine, including its history and development, see generally Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999).

20. *Perry*, 460 U.S. at 44 (emphasis added).

21. *Id.*

22. *Id.* at 45.

23. *Id.*

24. *Id.* at 46.

25. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 728-29 (1990) (plurality)

In a traditional public forum,²⁶ often exemplified by streets, sidewalks, and parks, speech receives the “greatest degree of protection.”²⁷ These areas are considered “quintessential” fora for expression.²⁸ As such, a governmental entity’s capacity to limit expression is subjected to the utmost scrutiny;²⁹ in fact, in such areas, “the government may not prohibit all communicative activity.”³⁰ Moreover, in a traditional public forum, the exclusion of a speaker premised on content must “serve a compelling state interest” and be “narrowly drawn to achieve that end.”³¹ A governmental entity can restrict speech in a traditional public forum pertaining to “regulations of the time, place, and manner of expression.”³² But even these regulations must be 1) content-neutral,³³ 2) narrowly tailored to serve

(sidewalk’s status as nonpublic forum served to validate restriction on solicitation); *Families Achieving Independence & Respect (FAIR) v. Neb. Dep’t. of Soc. Servs.*, 111 F.3d 1408, 1418 (8th Cir. 1997) (court found lobby of social services office to be nonpublic forum, and, therefore, held ban on advocacy groups permissible).

26. This category has also been referred to as “open public forum” by the Supreme Court. *Good News Club*, 533 U.S. at 106. The import of this synonym has yet to be fleshed out.

27. *FAIR*, 111 F.3d at 1418.

28. *Frisby*, 487 U.S. at 481. A traditional public forum has as a principle purpose the “free exchange of ideas.” *Cornelius*, 473 U.S. at 800. See Steven G. Gey, *Reopening the Public Forum - From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538-39 (1998) (Professor Gey correctly observes that “every culture must have venues in which citizens can confront each other’s ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized . . .”).

29. *Kokinda*, 497 U.S. at 726.

30. *Perry*, 460 U.S. at 45. With a street, sidewalk, or park, for example, the government cannot prevent all expressive activity and limit those areas only to travelers or joggers. See *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640, 651 (1981) (street is “not only a necessary conduit in the daily affairs of a locality’s citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment”).

31. *Perry*, 460 U.S. at 45. If a restriction on expression in a public forum is content-based, an analysis known as strict scrutiny applies. *Id.* Typically, regulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). The Supreme Court admonishes, “we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (holding Communications Decency Act of 1996 unconstitutional).

32. *Perry*, 460 U.S. at 45.

33. *Id.* Whether a restriction is content-based or content-neutral is for the most part manifest. See, e.g., *Carey v. Brown*, 447 U.S. 455, 465 (1980) (law banning picketing while making exception for labor picketing held unconstitutional as premised on content). The

a significant government interest,³⁴ and 3) leave open ample alternative channels of communication.³⁵ Hence, as demonstrated, any type of content-based or even content-neutral regulation of speech within the confines of a traditional public forum comes to a court with a very difficult and high burden.

The second category of forum, the “designated” or “limited public forum,”³⁶ shares many features of the traditional public forum. Though “a State is not required to indefinitely retain the open character” of a designated public forum, “as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”³⁷ Essentially, the designated public forum is an all-or-nothing venture. Once the government has opened an area to public expression,³⁸ the area becomes subject to same standard

inquiry boils down to whether “the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

34. *Perry*, 460 U.S. at 45. A law is “narrowly tailored” if it “eliminates no more than the exact source of the evil it seeks to remedy.” *Frisby*, 487 U.S. at 480.

35. *Perry*, 460 U.S. at 45. One may not have her constitutional right to expression infringed upon simply because she may exercise it elsewhere. *Schneider v. State of N.J.*, 308 U.S. 147, 163 (1939). The particular goals and needs of the expression in question may dictate whether or not the proffered alternatives are, in fact, viable alternatives for speech. *See Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997) (held that government could not choose what public forum speaker could use, noting “it cannot rightly be said that all such forums are equal.”).

36. The terminology attached to this category is subject to debate. *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 340, 345-46 (5th Cir. 2001) (“Despite the acceptance of a middle category between traditional and nonpublic forums, there is some confusion over the terminology used to describe this category. Two terms - ‘designated public forum’ and ‘limited public forum’ - have been utilized by the Supreme Court, our sister circuits, and this court, yet there has not been agreement on their meaning. Specifically, it has not been clear whether the terms should be used interchangeably to describe the middle tier of forum, or in fact described different types of forums subject to different levels of First Amendment scrutiny.”) The distinction between limited and designated public fora, if any, is a detour we decline to take in this article. Despite the inconsistent use of the terms in the lower courts, the Supreme Court employs these terms interchangeably and has never indicated the existence of a fourth category. *Compare Good News Club*, 533 U.S. 98 (refers to intermediate category as “limited public forum”) *with Forbes*, 523 U.S. 666 (refers to intermediate category as “designated public forum”).

37. *Perry*, 460 U.S. at 46.

38. The second category of fora consists of public property which the state has opened for use by the public as a place for expression. *FAIR*, 111 F.3d at 1418. To open a forum, the access allowed must be “general” as opposed to “selective.” *Forbes*, 523 U.S. 678-80. It takes more than isolated incidents of permitted expression to establish a forum. *Id.*

as a traditional public forum.³⁹ Yet, in contrast to a traditional public forum, the government may restrict a designated public forum to certain types or a class of speakers. For example, the government can open an auditorium and create a limited public forum for musical performances, thereby legally excluding all other types of expressive activity, such as debates and protests.⁴⁰ With this freedom, however, the government may not open the forum to a class of speakers and then forbid speakers within that same class.⁴¹

Finally, in a nonpublic forum, the government may act with the most discretion. Besides “time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁴² Courts are much more willing to defer to governmental decisions under this standard. Even so, in a nonpublic forum, the government does not have free reign.⁴³ In all forums of governmentally owned property, the government is not permitted to regulate or discriminate on the basis of the speaker’s viewpoint.⁴⁴ And any restriction affecting protected expression must, at a bare minimum, be reasonable under the circumstances.⁴⁵

39. It is thus subject to the same high burden. *See, e.g.,* *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738, 744 (E.D. Va. 2001) (school board by-law precluding “personal attacks” deemed unconstitutional prior restraint in limited public forum).

40. *Perry*, 460 U.S. at 45 n.7. (“A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects”) (citations omitted). *See Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (held proper for senior citizens’ center to be open only for discussion of subjects of interest to elderly).

41. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding municipality, having created limited public forum for theatrical productions, could not censor controversial musical); *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1266 (E.D. Wis. 2000) (holding public library’s policy of excluding conference room use for religious meetings unconstitutional, given room’s status as limited public forum for non-profit organizations and community service).

42. *Perry*, 460 U.S. at 46.

43. The government does not possess “unfettered power to exclude any [speaker] it wish[es].” *Forbes*, 523 U.S. at 681.

44. Viewpoint discrimination is flatly prohibited in any forum. When government officials restrict access to a forum in a manner that discriminates against the speaker on the basis of viewpoint, they are guilty of “discrimination that is impermissible regardless of forum status.” *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 567 (7th Cir. 2001).

45. *Forbes*, 523 U.S. at 682. Reasonableness, in this context, “must be assessed in the light of the purpose of the forum and all surrounding circumstances.” *Cornelius*, 473 U.S. at 809. The standard is lax, and shows great deference to the government, but it “does not mean that the government can restrict speech in whatever way it likes.” *Forbes*, 523 U.S.

As evinced by this brief introduction to the tripartite structure of forum analysis, the depiction of “traditional public forum” carries with it substantial benefits for would-be speakers.⁴⁶ As the Supreme Court continues to elaborate on and clarify the make-up of traditional as well as other types of fora, the significance of the classification continues to increase.

III. Depicting a Forum as Traditional

Given the protection afforded speech in traditional public fora, and the deference afforded governmental entities in nonpublic fora, any issue over the propriety of speech on governmentally owned property most likely turns on whether the property qualifies as a traditional public forum.⁴⁷ Therefore, the definition of a traditional public forum plays a large role in cases involving free speech in public areas.

Following the *dicta* in *Hague*,⁴⁸ lower courts invariably concur that streets, sidewalks, and parks are traditional public fora.⁴⁹ As often quoted, “[w]herever the titles of streets and parks *may rest*, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁵⁰ This general understanding pertaining to streets and like

at 681. See, e.g., *Huminski v. Corsones*, 396 F.3d 53, 92-93 (2d Cir. 2005) (singling out individual for speech exclusion is “not reasonable” in nonpublic forum); *Vasquez v. Housing Auth. of City of El Paso*, 271 F.3d 198, 205-06 (5th Cir. 2001) (held ordinance banning door-to-door political campaigning “not reasonable” when other individuals permitted entry for “legitimate business purposes”); *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996) (holding that it was “not reasonable” to allow employees to post materials around office on different subjects, and forbid only posting of religious information and materials).

46. See *Davis*, *supra* note 6, at 276 (“If the college campus is a public forum, then the speech zone regulations must comply with the requirements of the time, place or manner test”).

47. Compare *Lederman v. U.S.*, 291 F.3d 36, 41 (D.C. Cir. 2002) (holding sidewalk adjacent to Capitol traditional public forum, and, thus, restrictions on demonstration invalid) with *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1290 (10th Cir. 1999) (holding city’s ban on demonstrations at plaza of performing arts center valid restriction due to plaza being nonpublic forum).

48. 307 U.S. 496.

49. E.g., *Parks v. City of Columbus*, 395 F.3d 643, 648 (6th Cir. 2005) (streets and sidewalks); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (pedestrian mall); *Warren v. Fairfax County*, 196 F.3d 186, 194-96 (4th Cir. 1999) (lawn in front of county building with sidewalks and park-like areas).

50. *Hague*, 307 U.S. at 515 (emphasis added). For this reason, streets, sidewalks, and parks are considered “prototypical” examples of traditional public fora. *Schneck v. Pro-*

venues “wherever” they may lie provides a bright line and workable framework in which to set aside certain qualities that are characteristic of a traditional public forum. But despite the existence of this framework, courts tend to stray and appeal to various other factors in weighing these matters, creating regrettable confusion and inconsistency in the law.⁵¹

Although something beyond a shallow analysis of the precedent is necessary, the Supreme Court does provide unmistakable guidance for forum analysis, which should serve to clear up the confusion. This guidance is derived primarily through the work of one Supreme Court justice, Justice Kennedy, and from his product, a moderate consensus in certain appellate courts has arisen as to which factors are relevant and most important in defining a traditional public forum.

A. Presumptively Traditional Areas: Streets, Sidewalks, and Parks

While courts tend to access numerous factors in fleshing out the parameters of forum analysis, there exists a singular bright line rule that continues to add clarity and predictability to the analysis: Streets, sidewalks, and parks are presumptively traditional public fora.⁵² Precedent makes plain that such areas are to be considered traditional public fora, and courts are properly hesitant to depart from this well established pattern.⁵³ In this sense, areas possessing general characteristics of streets, sidewalks, and parks present strong indication that they are uniquely suitable for expressive purposes.

Indeed, the Supreme Court often considers streets, sidewalks, and parks as traditional public fora, without further consideration.⁵⁴

Choice Network, 519 U.S. 357, 377 (1997). No “particularized inquiry” is required for such areas. *Frisby*, 487 U.S. at 481.

51. Cf. *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998) (considering a balance of interests, public thoroughfare status, value as expressive locale, and government interest in commercial revenues); *Int’l Society for Krishna Consciousness v. N.J Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982) (considering dedication to recreational use and inconsistency between free speech and governmental intent); *Citizens to End Animal Suffering & Exploitation v. Faneuil Hall Marketplace*, 745 F. Supp. 65, 75-76 (D. Mass. 1990) (considering historic use and use as pedestrian connection to purely public adjoining areas).

52. See *Frisby*, 487 U.S. at 481 (analyzing fora classification of public street).

53. See, e.g., *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682, 688 (N.D. Ill. 1994) (park held to be traditional public forum despite government’s intention for it to be otherwise).

54. This has been true ever since the *Hague* decision and its specific mention of the special characteristics of streets and parks. 307 U.S. at 515.

In *United States v. Grace*,⁵⁵ for instance, the Supreme Court upheld the traditional public forum status of certain sidewalks located on the exterior of the Supreme Court building.⁵⁶ Rather than go into an in-depth analysis about the nature and purpose of those sidewalks, the Court noted “that ‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’”⁵⁷

Similarly, the Supreme Court in *Schenck v. Pro-Choice Network*⁵⁸ struck down the use of “floating buffer zones” to prevent abortion protestors from addressing those entering abortion clinics. In so ruling, the Court again relied on the general nature of these presumptive areas, determining that “speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.”⁵⁹

The Supreme Court, perhaps, made its most definitive statement for the presumptive character of streets, sidewalks, and parks in *Frisby v. Schultz*,⁶⁰ wherein the Court struck down a Wisconsin law forbidding picketing on public streets in front of residences.⁶¹ In lieu of assessing the individual nature and purpose of the residential street in question, the Court relied purely on the general character of public streets, holding:

No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the antipicketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora.⁶²

Appellate courts have followed suit and given similar recognition to the presumptive character of public streets, sidewalks, and parks.⁶³

55. 461 U.S. 171 (1983).

56. *Id.* at 180.

57. *Id.* at 177.

58. 519 U.S. 357 (1997).

59. *Id.* at 377.

60. 487 U.S. 474.

61. *Id.* at 487.

62. *Id.* at 481.

63. See, e.g., *ACLU of Nev.*, 333 F.3d at 1099 (“[S]idewalks, streets, and parks generally are considered, without more, to be public forums.”) (citation and internal

Regardless of their surroundings or particular nature, these venues are acknowledged as *prima facie* traditional public fora.⁶⁴

B. Emergence of Compatibility as a Factor

In addition to the long-standing principle pertaining to the traditional status granted to streets, sidewalks, and parks, a parallel principle has emerged regarding compatibility of speech in a given public area. This principle was recognized in *Greer v. Spock*,⁶⁵ a case in which the Supreme Court bypassed the presumption given to streets and sidewalks because of the unique circumstances attached to a federal military institution.⁶⁶ Therein, the Court analyzed a regulation banning political speeches and demonstrations on the military institution of Fort Dix.⁶⁷ Even though civilians were free to enter the area, the High Court did not deem the property effectively “open” since the commanding officer had “unquestioned power” to exclude civilians from the area at any moment.⁶⁸ Because military

quotation marks omitted); *First Unitarian Church*, 308 F.3d at 1129 (“[W]e do not believe the special nature of this particular pedestrian passageway - that it traverses private property rather than abuts a public street - defeats its status as a public forum. The Supreme Court has made clear that once an ‘archetype’ of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum.”); *Rappa v. New Castle County*, 18 F.3d 1043, 1071 (3d Cir. 1994) (“Once it is determined that the forum at issue is public roads, it is clear that it is a public forum.”); *Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir. 1992) (“There can be no doubt that the streets of Jefferson County, Kentucky, are traditional public fora.”).

64. The presumption attached to streets, sidewalks, and parks begs the question of whether traditional public fora can exist outside of these specific venues. According to Justice Kennedy, the Supreme Court has “rejected the view that traditional public forum status extends beyond its historic confines.” *Forbes*, 523 U.S. at 679. But the meaning of this is less than clear. It would seem that “historic confines” refer to certain characteristics, not a limited set of forums. See generally *Gey*, *supra* note 28 (arguing that traditional public forums should extend beyond sidewalks and parks to “metaphysical” forums).

65. 424 U.S. 828 (1976).

66. *Id.* at 837-38. The Court observed that a military installation is different. “The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.” *Id.* at 838 (citation and quotation omitted).

67. *Id.* at 831.

68. *Id.* at 838. In the ruling, the Supreme Court distinguished its earlier decision of *Flower v. United States*, 407 U.S. 197 (1972). In *Flower*, the Court held that the military had abandoned any claim that it had a special interest in the avenue in question, thus making it no different than any other public street. 407 U.S. at 198. *Greer*, however, was not a case where military authorities had abandoned claims of special interest in regulating expression. 424 U.S. at 838. In fact, the record was in direct contraposition to such a

installations, as a basic function, grant historical and unquestioned control of the area to the commanding officer, the streets and sidewalks found therein were not deemed public fora.⁶⁹

Justice Powell, in his concurrence in *Greer*, best articulated the guiding standard to determine traditional public forums, a standard that lies in compatibility:

The Court is to inquire whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time . . . it is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a public forum, or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the First Amendment rights of the private parties. Some basic incompatibility must be discerned between the communication and the primary activity of an area.⁷⁰

With this standard in tow, Justice Powell went on to assess the special nature of the military and the possible ways that speech would interfere with the military's purpose.⁷¹

Another important case in this line dealing with compatibility is *United States v. Kokinda*.⁷² In *Kokinda*, police prevented volunteers from soliciting contributions and distributing political information on a public sidewalk leading up to a Maryland post office.⁷³ The relevant Maryland law forbade solicitations on postal premises.⁷⁴ In a fractured decision, a plurality consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, and White, held that the way leading to the entrance of the post office is a nonpublic forum and the

claim. Therefore, the *Greer* Court made manifest that *Flower* did not express any new principles of freedom of speech on government property; it was, rather, a case of a prototypical public street that was compatible with expression. 424 U.S. at 838.

69. *Greer*, 424 U.S. at 837-38.

70. *Id.* at 843 (Powell, J. concurring) (citation and quotation omitted).

71. *Id.* at 843-44. Conversely, if a particular venue is open and accessible and is compatible with expression, such venue ought to be considered a traditional public forum. *Cf. Paulson v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991) (holding grounds outside of coliseum to be public forum, appellate court distinguished *Greer*, determining that expressive activities did not threaten same type of governmental function at coliseum as that implicated on military base).

72. 497 U.S. 720 (1990) (plurality).

73. *Id.* at 723.

74. *Id.*

Maryland law a reasonable regulation.⁷⁵ Contrariwise, Justices Brennan, Marshall, Stevens, and Blackmun believed the sidewalk to be a traditional public forum and the law not narrowly tailored to serve a compelling government interest.⁷⁶ As a decisive swing vote, Justice Kennedy strongly implied that the path is a traditional public forum, but proceeded to uphold the law as a valid time, place, or manner restriction.⁷⁷

In denying traditional forum status, the plurality refused to conceive the sidewalk in question as being a classic public sidewalk. To the contrary, the plurality held:

The right of access under consideration in this case [is not] the quintessential public sidewalk which we addressed in *Frisby v. Schultz*. The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.⁷⁸

The *Kokinda* plurality premised its reasoning on the holding in *Greer* finding a street open to the public within the confines of a military base not to be a traditional public forum.⁷⁹ Justice O'Connor, author of the opinion, summarized that "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum."⁸⁰ Taken in isolation, thus, *Kokinda* would seem to undermine the existence of any presumption regarding public sidewalks and likewise streets and parks.

Two considerations, however, rebuff this hasty generalization. First, a majority of justices in *Kokinda* actually ruled the sidewalk in question to be, in fact, a traditional public forum.⁸¹ The dissenting justices explicitly rejected any reasoning that would require an analysis of a specific type of sidewalk. Instead, the dissent considered critical the fact "that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a

75. *Id.* at 730, 737.

76. *Id.* at 740, 755 (Brennan, J., dissenting).

77. *Id.* at 737-39 (Kennedy, J., concurring).

78. *Id.* at 727-28 (citation omitted).

79. *Id.* at 728-29.

80. *Id.*

81. See *Lederman v. U.S.*, 291 F. 3d 36, 43 (D.C. Cir. 2002) ("only four Justices [in *Kokinda*] agreed with the government that the sidewalk in question was a nonpublic forum").

public forum.”⁸² Furthermore, these four justices proceeded to deny any basis for the type of analysis undertaken by the plurality since “[t]he cases that formed the foundation of public forum doctrine did not engage in the type of fact-specific inquiry undertaken by the plurality today.”⁸³ Similarly, Justice Kennedy, as the decisive member,⁸⁴ implicitly determined the sidewalk to be a traditional public forum. Though he did not explicitly label the sidewalk, Justice Kennedy did note:

The public’s use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression. . . . It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum.⁸⁵

In light of the uneven nature of the Court in this decision, and the comments of Justice Kennedy, if anything, *Kokinda* stands for the minimal universal principle that sidewalks remain prototypical public fora.⁸⁶

Secondly, even if the *Kokinda* plurality could serve as limited precedent, that precedent supports the theory espoused heretofore, namely, that streets, sidewalks, and parks are presumptively traditional public fora.⁸⁷ The *Kokinda* plurality never denied the fact that sidewalks and streets are generally considered traditional public fora. Instead, the plurality differentiated the sidewalk under consideration from classic examples of sidewalks and proceeded to

82. *Kokinda*, 497 U.S. at 745 (Brennan, J., dissenting).

83. *Id.* at 746 (Brennan, J., dissenting).

84. *See* First Unitarian Church v. Salt Lake City, 308 F. 3d 1114, 1125 n.6 (10th Cir. 2002) (“We cite Justice Kennedy’s concurrence [in *Kokinda*] as controlling Supreme Court precedent because his concurrence provided the fifth vote on the narrowest grounds”).

85. *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring). This reading of *Kokinda* is further buttressed by Justice Kennedy’s use of time, place, and manner analysis. *Id.* Such standard is only appropriate for public forums.

86. The only logical way to interpret the phrase “more than a nonpublic forum” is that the area is public fora. It has to be one or the other. *See also* Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1618-19 (1992) (using *Kokinda* to illustrate fair interpretation of plurality decision).

87. *Accord* Rappa v. New Castle County, 18 F.3d 1043, 1071 n.49 (3d Cir. 1994) (acknowledging that *Kokinda* does not undercut general presumption that public sidewalks and roads are traditional public fora).

analyze the location and purpose of the particular sidewalk.⁸⁸

In fact, in the balance, the only consistent way to reconcile *Kokinda* with other Supreme Court precedent is to acknowledge a rebuttable presumption granted to a forum with objective characteristics of a street, sidewalk, or park. Per discussion *supra*, streets, sidewalks, and parks “without more” are traditional public fora.⁸⁹ Reading the precedents together, and consistently, incompatibility with expression constitutes the “more” that must be shown to rebut the presumption. This understanding best reconciles various factors and values involved in forum analysis. Lower courts, the government as property owner, and speakers all, benefit from clear rules, and a presumption premised on objective characteristics provides much needed predictability and clarity in the analysis. Yet still, such presumption gives courts sufficient flexibility to apply forum analysis to specific and different cases. The coupling of clarity and flexibility, in turn, ensures greater accuracy in achieving an optimum balance of the competing values at stake.

Perhaps, the clearest exposition of an objective compatibility approach comes from Justice Kennedy in his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*.⁹⁰ In the concurrence, Justice Kennedy reflects: “In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property. The fact that in our public forum cases we discuss and analyze these precise characteristics tends to support my position.”⁹¹ Justice Kennedy proceeds to lay out his proposal for an objective forum analysis methodology:

If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be

88. *Kokinda*, 497 U.S. at 730.

89. *Grace*, 461 U.S. at 177.

90. 505 U.S. 672 (1992). In *Lee*, a religious group challenged a ban on solicitation in an airport. *Id.* at 683. The Court, in a plurality decision, upheld the restriction as reasonable, judging the airport terminal to be a nonpublic forum. *Id.* The shallow analysis set forth by the plurality in reaching this conclusion generated an immediate firestorm of scholarly criticism. See generally R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine: International Society of Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), 16 HARV. J. L. & PUB. POL’Y 269 (1993); Stephen K. Shultz, *International Society of Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563 (1993); David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injury Nine: International Society of Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271 (1993).

91. *Lee*, 505 U.S. at 695 (Kennedy, J., concurring) (citations omitted).

appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing, and would provide little guidance to the State regarding its discretion to regulate speech. Courts must also consider the availability of reasonable time, place, and manner restrictions in undertaking this compatibility analysis.⁹²

In recap, Justice Kennedy, effectively speaking for the Supreme Court as a whole, articulates three prongs for defining a traditional public forum: 1) physical similarities with streets, parks, and sidewalks 2) open public access; and 3) compatibility of expression with the objective use of the property. The Supreme Court has effectively embraced this objective approach.⁹³

C. Working it Out in the Circuits: Following the *Kennedy* Compatibility Trail

Noting the Supreme Court's reliance on objective and compatibility factors, several circuit courts have begun to exercise these criteria for forum analysis, adopting the reasoning illuminated

92. *Id.* at 698-699. Recognizing the influence of Justice Kennedy, this standard set out in the *Lee* concurrence was adopted *in toto* by the Tenth Circuit. *First Unitarian Church*, 308 F.3d at 1125. Commentators also appear to approve of Justice Kennedy's logic and acknowledge its weight. *E.g., Gey, supra* note 28 (drawing on Kennedy's remarks, argues that First Amendment protects speech in public place unless speech would significantly interfere with government's non-communicative activities in that space).

93. *See, e.g., Forbes*, 523 U.S. at 677 ("Traditional public fora are defined by the objective characteristics of the property...") (citation and quotation omitted). One commentator suggests that Justice Kennedy abandoned his compatibility approach and adopted a governmental intent standard when he wrote the *Forbes* decision. *See* David S. Day, *The Public Forum Doctrine's "Government Intent Standard": What Happened to Justice Kennedy?*, 2000 L. REV. MICH. ST. UNIV. DET. C. L. 173 (2000). But this author fails to see any deviation in Kennedy's approach. Justice Kennedy, ruling with the majority in *Forbes*, analyzed a forum that was plainly not a traditional public forum, thus governmental intention became an appropriate consideration. In so doing, however, Kennedy specifically mentions in *dicta* that traditional public fora are to be judged by objective characteristics. *Forbes*, 523 U.S. at 677.

by Justice Kennedy. These appellate courts have taken to heart the Supreme Court's admonitions, combining an analysis of the physical characteristics and a general standard assessing whether speech is compatible with the purpose of the property, in classifying the forum status of public property.⁹⁴

1. *D.C. Circuit*

For example, the District of Columbia Circuit appears to lean toward a more objective approach in judging traditional public fora. In *Henderson v. Lujan*,⁹⁵ an evangelist was prevented from distributing information on city sidewalks near the Vietnam Veterans Memorial wall.⁹⁶ In assessing the matter, the appellate court relied heavily on the fact that the sidewalks in question are physically similar to an ordinary sidewalk: "The two sidewalks here appear to be classic instances. They are physically indistinguishable from ordinary sidewalks used for the full gamut of urban walking. They are used by thousands of pedestrians every year, including not only Memorial visitors but also people going to other places."⁹⁷

The D.C. Circuit continued toward a more functional definition of a traditional public forum in *Lederman v. United States*.⁹⁸ There, the government arrested individuals for distributing leaflets in a "no-demonstration zone" on the sidewalk at the foot of the Senate steps near the Capitol Building.⁹⁹ The appellate court upheld the sidewalk as a traditional public forum.¹⁰⁰ The upshot of the Court's decision reveals that it did not consider the intention of government in its reasoning, but looked to the purpose and function of the sidewalk in question: "In short, although the East Front sidewalk borders no public streets, it is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of [the city's] citizens, but also a place where people may enjoy the open air or the company of friends and neighbors, and a place from which tourists may view and photograph the Capitol. Under these circumstances, we agree with the district court that, like the rest of the

94. Thus, rejecting the subjective government intent standard for judging public fora.

95. 964 F.2d 1179 (D.C. Cir. 1992).

96. *Id.* at 1180-81.

97. *Id.* at 1182.

98. 291 F.3d 36 (D.C. Cir. 2002).

99. *Id.* at 40.

100. *Id.* at 41-44.

Capitol Grounds, the sidewalk is a traditional public forum.”¹⁰¹ With this ruling, the *Lederman* court makes clear that mere notice did not prove decisive in its ruling because the sidewalk under consideration was not near any other public sidewalk.¹⁰² Instead, the D.C. Circuit compared a public sidewalk to the sidewalk at the Capitol in terms of certain objective characteristics, thereby concluding the latter a traditional public forum.¹⁰³ Thus, the language of the D.C. Circuit’s decisions focuses on purpose, physical characteristics, and compatibility with speech, and so implies a move away from any reliance on governmental intention.¹⁰⁴

2. First Circuit

The very nature of most sidewalks and streets allows courts to presume that these areas are traditional public fora. Importantly, the First Circuit, in *New England Regional Council of Carpenters v. Kinton*,¹⁰⁵ explicitly recognized this jurisprudential understanding of the precedents.¹⁰⁶ In this matter, the Court of Appeals for the First Circuit ruled a pier with restaurants and interior walkways not a traditional public forum and thus the government could prevent the distribution of information thereon.¹⁰⁷ Wrestling with the nature of the sidewalks located within the pier, the *Kinton* court relied explicitly on the presumptive nature of sidewalks and on the possibility of rebutting that presumption, as established by *Kokinda*:

Some spaces – such as public streets, sidewalks, and parks – are presumptively public fora, and in most cases no particularized inquiry into their precise nature is necessary. We say “most” rather than “all” because this presumption can be rebutted in specific instances. The problem of classification grows increasingly difficult in instances in which no presumption is available, and categorical distinctions are of little help in borderline cases. In the end, an inquiring court must examine the nature of the locus, as well as its history, to determine

101. *Id.* at 44 (quotation and citation omitted).

102. *Id.* at 39. This is significant because a couple of circuits seem to incorporate notice as a factor in the process. See discussion *infra* at note 126.

103. *Id.* at 41-44.

104. An important distinction, signaling a reliance on the Kennedy concurrence, rather than the plurality, in *Kokinda*.

105. 284 F.3d 9 (1st Cir. 2002).

106. *Id.* at 20-21.

107. *Id.* at 22-29. In *Kinton*, the First Circuit reviewed the propriety of a ban on leafleting on a multi-purpose pier and permit requirement for public ways in the area. *Id.* at 15-17.

whether it qualifies as a traditional public forum.¹⁰⁸

As articulated by the First Circuit, the guiding basis for forum analysis must involve the property's nature.

3. *Ninth Circuit*

At one time, in the not so distant past, the Ninth Circuit Court of Appeals utilized an analysis that looked to government intent to define a traditional public forum.¹⁰⁹ More recently, however, the Ninth Circuit repudiated its prior logic and substantially moved toward an approach akin to that of Justice Kennedy's analysis in *Lee* and *Kokinda*.

In *ACLU of Nevada v. City of Las Vegas*,¹¹⁰ Las Vegas turned several blocks of a downtown street into a publicly-owned pedestrian mall and placed substantial restrictions on expressive activity in the mall.¹¹¹ The court ruled that the mall was a traditional public forum by taking into account two general factors: "First, and most significantly, there is a common concern for the compatibility of the uses of the forum with expressive activity,"¹¹² and then "[s]econdly, the case law demonstrates a commitment by the courts to guarding speakers' reasonable expectations that their speech will be protected."¹¹³ After announcing these general concerns, the appellate court went on to lay out the three specific criteria adopted by the Ninth Circuit: "1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) traditional or historic use of both the property in question and other similar properties."¹¹⁴ Those factors emphasize that a property's purpose must be assessed objectively rather than by

108. *Id.* at 20-21 (citations and parentheticals omitted).

109. See *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (ruling that interstate rest areas are not traditional public forums, court remarked "it is the location and purpose of the property and the government's subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum analysis.") (citations omitted).

110. 333 F.3d 1092 (9th Cir. 2003).

111. *Id.* at 1094-95. Particularly, local ordinance limited leafleting and vending in the mall area. *Id.*

112. *Id.* at 1100.

113. *Id.*

114. *Id.* at 1100-01 (citations omitted).

the intent of the government. Hence, the standards adopted by the Ninth Circuit resemble those proposed by Justice Kennedy with a focus on objective physical characteristics, objective purpose, physical similarity, and compatibility with speech.¹¹⁵

4. Tenth Circuit

The Court of Appeals for the Tenth Circuit has moved even closer to Justice Kennedy's position than the other circuits. In *Faustin v. City and County of Denver, Colorado*,¹¹⁶ the appellate court analyzed the right of an anti-abortion advocate to protest on a highway overpass, and found the overpass to be a traditional public forum.¹¹⁷ Though the court's reasoning is brief, the opinion reflects that the circumstance of the overpass "link[ing] the parallel sides of the street to one another, acting as a thoroughfare between them rather than providing access to a single remote location" proved decisive.¹¹⁸ Again, as with the other circuits embracing this way of forum analysis, the court reviewed certain objective characteristics of the property rather than defer to a formal conception of tradition or government intent.

The Tenth Circuit Court of Appeals confirmed its acceptance of objective characteristics in the more recent decision of *First Unitarian Church v. Salt Lake City*.¹¹⁹ In this case, the city sold a portion of downtown to the Church of Jesus Christ of Latter-Day Saints but retained an easement for public use.¹²⁰ The First Unitarian Church, among others, challenged the constitutionality of such a sale.¹²¹ Despite the fact that the sales contract explicitly denied the creation of a public forum, the Tenth Circuit held that the easement was a traditional public forum.¹²² And, after explicitly denying that

115. Interestingly, the City of Las Vegas appealed this decision to the Supreme Court but the Supreme Court denied the writ of certiorari with no dissenting opinion. *City of Las Vegas v. ACLU*, 540 U.S. 1110 (2004). Such a denial may simply flow from an overcrowded judicial docket, or the denial may represent a desire to see these issues develop more thoroughly in the district and circuit level before tackling the issue, or, perhaps, it may reflect full agreement with the Ninth Circuit.

116. 268 F.3d 942 (10th Cir. 2001).

117. *Id.* at 949-50.

118. *Id.* at 949.

119. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002).

120. *Id.* at 1117-18.

121. *Id.* at 1119.

122. *Id.* at 1128.

government intent controls forum analysis, the appellate court specifically cites Justice Kennedy's proposed three-prong test and notes that they "apply these factors to assess the easement's character for First Amendment purposes."¹²³ Thus, the Tenth Circuit currently employs a multi-factorial approach that includes the "actual purpose and use of the easement," "whether speech activities are compatible with the purpose of the easement," and finally "the history of the property."¹²⁴ Hence, the Tenth Circuit formally adopts the blueprint laid out by Justice Kennedy, focusing on objective characteristics and compatibility rather than governmental intent.¹²⁵

D. Articulating the Standard

As evidenced in the D.C., First, Ninth, and Tenth Circuits, as a growing trend, courts have turned to a presumptive objective-oriented approach to depict a traditional public forum.¹²⁶ Yet, there is

123. *Id.* at 1125.

124. *Id.* at 1126-29. As with the *ACLU of Nevada* opinion in the Ninth Circuit, the Supreme Court denied certiorari on this case. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 1002), *cert. denied, sub nom.* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. *First Unitarian Church*, 539 U.S. 941 (2003). Thus, despite ample opportunity to do otherwise, the Supreme Court has kept the objective-based analysis intact.

125. See generally Seth D. Rogers, Note, *A Forum By Any Other Name. . . Would Be Just As Confusing: The Tenth Circuit Dismisses Intent From The Public Forum. First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), 4 WYO. L. REV. 753 (2004) (acknowledging and applauding the Tenth Circuit's rejection of governmental intent standard in *First Unitarian Church*).

126. Three other circuits, the Fifth, the Sixth, and the Seventh, also bear mentioning. Although they incorporate objective characteristics in their public fora analysis, and steer away from governmental intent, these circuits take a different approach.

The appellate courts in the Fifth and Sixth circuits appear to include notice as a factor in their reasoning. The case of *Brister v. Faulkner*, 214 F.3d 675, 678 (5th Cir. 2000) emanating from the Fifth Circuit, involved restriction on speech on a section of sidewalk on a public university. *Id.* at 678. The Court of Appeals viewed the university sidewalk indistinguishable from city sidewalks, and, as such, deemed the university sidewalk a public forum. *Id.* at 682. The lack of notice of failing to inform someone that he was entering into some special enclave controlled the analysis. *Id.* at 682-83 (citing *United States v. Grace*, 461 U.S. 171 (1983)). Similarly, the Court of Appeals for the Sixth Circuit relied on objective notice of physical characteristics. *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 455 (6th Cir. 2004). In *Gateway*, a religious organization wanted to demonstrate on sidewalks surrounding the complex where local professional sports teams played. *Id.* at 451. The appellate court held the privately-owned sidewalk to be a traditional public forum, because it "blends into the urban grid, borders the road, and looks just like any public sidewalk." *Id.* at 452.

The Seventh Circuit appears to adopt a novel approach that is set apart from the rest, premised on a cost-benefit analysis, as evidenced in the opinion of Chicago Acorn, *SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir.

still much confusion over the relevance and priority of factors within the approach itself.¹²⁷ For this reason, this section will enunciate a standard that seeks to clarify the factors and their respective ordering. This standard does not articulate a new test but rather seeks to consolidate existing precedents that represent a growing and undeniable trend toward a more reasoned, objective approach to forum analysis. The proper standard has two prongs, each with important subpoints: 1) the area must share characteristics of streets, sidewalks, and parks and 2) expressive behavior must be compatible with the objective purpose of the property in question.¹²⁸ Putting it succinctly, a traditional public forum is any parcel of governmental property that allows for open public access and is compatible with expressive activity.¹²⁹ Per discussion herein, this standard is mandated by precedent, as well as policy considerations.

1. *Physical Characteristics*

At the outset, it must be noted that the second prong (speech compatibility with property) is the general guiding factor behind this two-part test. In fact, as will be demonstrated, the policy considerations behind compatibility underlie the very reason for considering physical similarity in the first place. However, a pure balancing test considering only compatibility does not adequately reflect legal precedent nor does it provide sufficient guidance to lower courts. Physical similarity presents an easily testable factor for lower courts to apply, and for that reason, seems suitable as an independent prong. As proven in the prior section, both Supreme Court and circuit court jurisprudence contain a vital place for physical similarity. While *Kokinda* plurality somewhat downplayed the importance of physical

1998). In *Chicago Acorn*, the government prevented individuals from marching, protesting, or leafleting in a government-owned renovated naval pier containing recreational and commercial facilities. *Id.* at 698-99. After noting that the sidewalks within the pier area are not thoroughfares, Judge Posner, on behalf of the panel, went on to note that, "Navy Piers, being classified as a public forum is also not indispensable to the health of the market in ideas and opinions; there are plenty of other areas in Chicago for demonstrations in support of a higher minimum wage or other political objectives." *Id.* at 703. Accordingly, the cost of preventing such speech on the pier was considered low given the alternative locations. *Id.* Judge Posner, thus, compares the cost of preventing the speech with the cost of allowing the speech. In the end, Judge Posner and the Seventh Circuit, conclude that forcing free speech upon the area has the potential to discourage government from investing and renovating property. *Id.*

127. See *supra* note 51.

128. The following discussion attempts to articulate and expound on this standard.

129. As so phrased, this is the precise standard for determining the existence of a traditional public forum.

similarities, it still analyzed those physical similarities, and no Supreme Court decision has even branded an area as a traditional public forum without those qualities.¹³⁰

A definitive statement on physical characteristics flows from the case of *Heffron v. International Society for Krishna Consciousness*,¹³¹ where the Court judged a location hosting a state fair a public forum, and thus, the government was not justified in setting strict requirements for the expression of speech at the fair.¹³² Therein, the Court reassured that the archetypal public forum “is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality’s citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment.”¹³³ The *Heffron* Court stressed three physical qualities as characteristic: 1) accessibility to the public 2) public thoroughfare (uncongested-ness and necessary conduit) and 3) open air.¹³⁴ The Supreme Court has since either explicitly or implicitly stressed these three factors in public forum analysis.¹³⁵ These factors are appropriate for consideration because speech in an area with these qualities is of great worth given the opportunity to communicate with many people and the low possibility of the speech interfering with other activities.

a. Openness to the public

The Supreme Court has clarified that openness to the public is a critical factor to consider,¹³⁶ but the rationale for its importance has

130. And, as previously mentioned, Judge Kennedy’s concurrence, which embraced objective characteristics, best articulates the *Kokinda* ruling. See *supra* notes 81-86.

131. 452 U.S. 640 (1981).

132. *Id.* at 651.

133. *Id.*

134. *Id.* at 650-51.

135. E.g. *Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988); *United States v. Grace*, 461 U.S. 171, 177 (1983). Moreover, the Supreme Court recently referred to this category as the “traditional or open public forum,” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (1992), signifying an inextricable link between openness and accessibility and this particular category of forum.

136. See *Flower v. United States*, 407 U.S. 197, 198-99 (openness on public way on military installation dictated finding of public forum). See also *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring) (“In my view the policies underlying the [forum analysis] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983) (“If by policy or by practice the Perry School District has opened its

been less than clear. A mere appeal to tradition in no way explains the importance of openness. Tradition itself offers no reason and fails to recognize the reality that those in the past maintained a rationale for allowing speech in certain areas and not in others. The most obvious rationale for the traditional importance of openness is that speech in an area open to the public is more likely to be effective in that it will reach numerous people. In contrast, in an area that is closed to the public, a speaker will probably not reach as many persons with his or her message. Thereby, the potential benefits of speech in an open area are much greater than the potential benefits in a closed area with respect to the potential dissemination effect. In the same way, the potential costs of speech in a closed area are much greater than those costs in an open area. Practically speaking, there is probably a legitimate reason why the government has closed an area to the public. Areas such as military bases, libraries, or hospital emergency rooms could not ordinarily achieve their respective purposes if protests and loud speech exists.¹³⁷

b. Public Thoroughfare

A similar rationale applies to the importance of an area being a public thoroughfare, or as the *Heffron* Court described, an area "uncongested" and a "necessary conduit in the daily affairs of a locality's citizens."¹³⁸ Like an area open to the public, a public thoroughfare possesses qualities conducive for a speaker to communicate a message effectively, and thus courts often consider

mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture."); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (noting that use not only of streets but also "public places" have "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

137. "It is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum." *Greer v. Spock*, 424 U.S. 828, 838 (1981). "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." *Id.* at 840.

138. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. (1981) 651.

this factor.¹³⁹ Because numerous people pass through a public thoroughfare, a speaker can expose many different audiences to his message without need of transport. The benefits of speech here are great. Conversely, the potential costs of speech in the area are low. Unlike areas that dead end or where people become stagnant and overcrowded, a public thoroughfare would not lend itself to disruptions or congestion.¹⁴⁰ The possibility for a disruption to break out is low because if a passerby did not want to listen to the speaker that passerby could easily avoid the speaker and continue on his or her path.¹⁴¹ Thus, the value of speech in a public thoroughfare is great and the potential costs are minimal.¹⁴²

139. See *Lee*, 505 U.S. at 697-98 (Kennedy, J. concurring) (“[O]pen, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity.”); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1101 (9th Cir. 2003) (“Thus, when a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity. . . . Use of a forum as a public thoroughfare is often regarded as a key factor in determining public forum status”); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1128 (10th Cir. 2002) (“Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage.”); *Faustin v. City and County of Denver, Colorado*, 268 F.3d 942, 949 (10th Cir. 2001) (“Here, the overpass does not lead from a parking lot to the front door of a building, but enables pedestrian traffic to cross over a highway. It links the parallel sides of the street to one another, acting as a thoroughfare between them rather than providing access to a single remote location.”); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937, 943 (9th Cir. 2001) (“This replacement sidewalk is a thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use.”); *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (concluding that sidewalks at Navy Pier entertainment complex were not public forums because they were not part of the city’s automotive, pedestrian, or bicyclists’ transportation grid).

140. A “thoroughfare” is essentially a path that can lead from point A to point B, and necessarily includes all streets, sidewalks, and ways.

141. See *Lederman v. U.S.*, 291 F.3d 36, 43 (D.C. Cir. 2002) (“If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers . . . then we assume they are also capable of circumnavigating the occasional protester.”). The existence of thoroughfare avoids concerns brought about by an audience.

142. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (“Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture.”).

c. Open Air

Open air refers to the fact that an area is not contained within a building. This is a factor explicitly mentioned by the *Heffron* Court as a character trait of a traditional public forum.¹⁴³ The value of open air stems from the same rationale that gives credence to public thoroughfares or openness to the public. In an open-air area, the probability is low that a speaker will substantially disrupt the purposes of the area. Because of the open air, sound will easily dissipate and thus open-air areas seem the most conducive to demonstrations, protests, and loud speaking. The value of open air could also explain the *Lee* decision that an airport is not a traditional public forum.¹⁴⁴ Clearly, the airport contains "public thoroughfares full of people and lined with stores and other commercial activities" and is "open to the public without restriction."¹⁴⁵ Yet, the fact that the relevant areas are inside means that the possible disruption coming from solicitation is more likely.¹⁴⁶

143. *Heffron*, 452 U.S. at 651. However, at least one appellate court declines to acknowledge this consideration. In fact, Judge Posner, speaking for the Seventh Circuit, explicitly denies the importance of open air:

There is no relevant difference between the sidewalks on Navy Pier and the public areas of the indoor shopping malls. Both types of pathway are pedestrian walkways leading mainly to shops. The fact that one type has a roof over it and the other does not cannot make as large a difference as the district judge (who, remember, classified the sidewalks as a traditional public forum and the interior walkways as a totally nonpublic forum) thought. What is true is that some of the interior walkways are rather narrow, compared to Dock Street.

Chicago Acorn, 150 F.3d at 703. This decision dimming the significance of open air can be easily distinguished on other grounds, especially the lack of a thoroughfare. Notwithstanding, Judge Posner seemingly denies the importance of open air on the ground that such a factor does not affect the value or cost of speech. The Supreme Court would undoubtedly reach the opposite conclusion.

144. *See supra* note 90.

145. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 700 (1992) (Kennedy, J., concurring).

146. Even so, the possible disruption of leafleting is low even inside a structure, because such activity does not trigger as much congestion as face-to-face solicitation. For this reason, Justice O'Connor, in *Lee*, was much more willing to uphold the ban on solicitation than the ban of leafleting. *See id.* at 690 (O'Connor, J., concurring) ("leafleting does not entail the same kinds of problems presented by face-to-face solicitation . . . it is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.").

2. *Compatibility with Speech*

One of the major assertions of this discussion is that the guiding factor in forum analysis must be whether speech is compatible with the purpose of a given piece of property. Or as the Supreme Court puts it, “[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹⁴⁷ Compatibility is the only rationale that gives substance to objective physical characteristics.¹⁴⁸ If tradition or physical characteristics are not just labels that the court arbitrarily selects, then these factors are utilized in determining how compatible a piece of property is with speech.

This prong of the test must be a balancing test. There can be no mechanical device for calculating the optimum or minimum level of expressive activity on certain property. By the same token, such a balancing test cannot be boundless. Definite factors must guide the courts or they will remain at sea in their analysis. Besides physical similarities to other traditional public fora, therefore, the forum’s primary purpose and tradition ought to be considered as well.

a. *Forum’s Primary Purpose*

To determine whether speech is compatible with certain

147. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). *See also* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“In the case of streets and parks, the open access and viewpoint neutrality commanded by the doctrine is ‘compatible with the intended purpose of the property.’”) (citation omitted); *Lee*, 505 U.S. at 681 (“And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity.”); *Lee*, 505 U.S. at 698 (Kennedy, J., concurring) (“If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100 (9th Cir. 2003) (“Thus, when a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity.”); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1125 (10th Cir. 2002) (“To determine the easement’s nature and purpose, the question we address is whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether the government has expressly designated speech as a purpose of the property.”).

148. As one court discerns, “[a] definition that utilizes principles or functional characteristics to explain a term is often necessary to aid in a more complete understanding.” *Roberts v. Haragan*, 346 F. Supp. 2d 853, 859 n.6. (N.D. Tex. 2004). In reaching this conclusion, the district court accurately defined traditional public forum as “government property whose principal function would not be disrupted by expressive activity.” *Id.* (emphasis in original omitted).

governmentally owned property, the first necessity is to determine the purpose of that property and how speech could possibly interfere with that purpose. For example, the *Greer* Court made special mention of the fact that the military serves an important constitutionally authorized purpose of protecting the country.¹⁴⁹ In other words, a military base cannot effectively serve its important primary function of protection and training and also serve as a forum for public expression. The purposes of some facilities and property in light of the very nature of the property do not lend themselves to public speech. Certainly, the great importance of national defense combined with the need for a structure does not lend to public expression in such an environment.¹⁵⁰ This not true, however, with many government facilities that can accommodate public speech. For instance, in open areas in the vicinity of government debates or hearings, free speech can serve an important function. In some real sense, these activities go hand in hand in order for the citizens to petition the government and let their voices be heard.¹⁵¹ Unfortunately, there is no simple formula available to make this calculation. There are innumerable types of government property, ranging from military bases to hospitals to athletic stadiums. Each type presents unique qualities and considerations, and so this inquiry

149. *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) ("One of the very purposes for which the Constitution was ordained and established was to 'provide for the common defence,' and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable. In short, it is 'the prima business of armies and navies to fight or be ready to fight wars should the occasion arise.' And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.") (citation and quotation omitted).

150. *Id.*

151. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 802 (1995) (Stevens, J., dissenting) ("Indeed, parades and demonstrations at or near the seat of government are often exercises of the right of the people to petition their government for a redress of grievances—exercises in which the government is the recipient of the message rather than the messenger."); *Warren v. Fairfax County*, 196 F.3d 186, 196 (4th Cir. 1999) ("[T]he Center Island is part of a class of property which, by history and tradition, has been treated as a public forum. It is a part of the grounds of a seat of legislative and executive power. In general, the grounds . . . of state and federal capitol complexes . . . have consistently been held to be public fora.") (citation and quotation omitted); *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (Wright, J., concurring) ("[P]arks are much more like state capitol grounds . . . [they] have long been regarded as a particular kind of community area that, under the Anglo-American tradition, are available, at least to some extent and on a reasonable basis, for groups of citizens concerned with the expression of ideas.") (citation and quotations omitted).

must be fact specific.¹⁵²

b. Tradition

Tradition has always been an essential part of forum analysis. From the very inception of this doctrine, courts have focused on history to provide guidance in determining whether an area is a traditional public forum.¹⁵³ In fact, some have taken history and tradition as the determinative factor in forum analysis.¹⁵⁴ Hence, at least some deference to history is justifiable and should play a part in forum analysis.¹⁵⁵ Because forum analysis involves a balancing

152. The purpose of governmental property is to be contrasted with the intent of the governmental entity, discussed *infra*. Purpose is discerned by objective matters about the property, not by an espoused intention.

153. See, e.g., *Hague v. Committee of Industrial Organization*, 307 U.S. 496, 515 (1939) (“[W]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

154. Apparently, Justice Scalia is of this opinion. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Scalia, J. concurring) (“If the category of ‘traditional public forum’ is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from *tradition*.”) (emphasis in original). There is also some support from the Court as a whole that tradition is requisite. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (“We have rejected the view that traditional public forum status extends beyond its historic confines. The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.”) (citation and quotation omitted). And yet, the precise meaning of “tradition” seems to speak to characteristics, not specific types of property. See *United States v. Grace*, 461 U.S. 171, 178-79 (1983) (holding that although traditionally property itself had not been held open for use of public, it was a public forum because it belonged to the class of property historically available for expression); *Warren*, 196 F.3d at 196. The court has never precisely stated what those confines are, however. For instance, the court has never defined the terms “street,” “sidewalk,” or “park.” Nor has the Court strictly limited the traditional public forum category to streets, sidewalks and parks.

155. But blind reliance on tradition is misplaced. Indeed, Justice Kennedy has spoken clearly against such blind reliance: “Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.” *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 697-98 (1992). From a policy perspective, a cursory appeal to tradition will not achieve an optimum balance between First Amendment principles and other values. By the mere technological and societal changes that have occurred and will occur, certain areas will become perfectly compatible with free speech. At the same time, other more traditional areas will become less effective forums to communicate as people use these forums less. In order to fully protect a speaker’s ability to communicate a message and the general public’s ability to receive a message, forum analysis cannot be frozen in time.

between First Amendment values and other pragmatic concerns, such as safety and order, the best indication of the appropriate balance is actual application in a real time environment. If the controlling factor in forum analysis is the compatibility of speech with the property itself, past examples of how certain property interacts with free speech provide clear and important proof of the costs and benefits of allowing or forbidding speech in a certain area. In some areas, for example, the potential hazard of congestion and disruption cannot be estimated until speakers are allowed in the environment. Accordingly, many courts still appeal to tradition as one factor in their forum analysis.¹⁵⁶

As indicated by its presence of being just one prong, reliance on tradition serves as only one factor, among many, in forum analysis.¹⁵⁷ For tradition to be a useful analytic tool, instead of being a mere label, it must serve as an evidentiary force providing guidance towards the issue of compatibility. In itself, history provides no valuable insights for forum analysis except for clarity. By restricting a traditional public forum to sidewalks and parks, the Supreme Court does provide clarity and predictability to its ruling in forum analysis. However, clarity and predictability must be weighed against accuracy. By limiting forum analysis to tradition, courts exclude certain forums that are clearly compatible with public speech yet do not qualify under traditional definitions.¹⁵⁸ On the other hand, use of tradition as a guide, rather than a hinge, to forum analysis mediates between accuracy and predictability by providing the court more flexibility for

156. See, e.g., *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003) (applying three part test consisting of "1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) traditional or historic use of both the property in question and other similar properties. . .") (citations omitted); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1129 (10th Cir. 2002) (considering physical characteristics of property, its purpose and history of property); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937, 943-44 (9th Cir. 2001) (considering fact that sidewalk that was replaced had historically been public forum); *Warren*, 196 F.3d at 189-90 (holding that mall area was public forum by applying three-prong test that included physical characteristics of forum, objective purpose of forum and finally relying on the fact that "the Center Island mall is part of a class of property which by history and tradition has been open and used for expressive activity").

157. See, e.g., *First Unitarian Church*, 308 F.3d at 1129 (tradition "is a factor indicating the property is a public forum, although this is not determinative").

158. A good example of traditional public forum outside of presumptive categories is a public lawn in front of a government building. Such spaces should always be considered traditional public fora. See e.g. *Accord Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004) (courthouse lawn); *Warren*, 196 F.3d at 196 (lawn in front of county building).

fact specific situations. In short, history and tradition's evidentiary value can still provide predictability without overly constricting forum analysis. The placement of tradition along side a forum's primary purpose and alternative forums for speech, best acknowledges tradition's role as an evidentiary tool. A balancing between these factors allows courts certain flexibility needed in this difficult arena while at the same time providing clear guideposts for predictable results.

E. Effect of Governmental Intent

Status as a traditional public forum is not dependant on will of government; traditional public fora are open for expressive activity regardless of governmental intent.¹⁵⁹ Traditional public fora, like streets and sidewalks, cannot be transformed to nonpublic fora by government whim. As a fundamental principle, the government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums."¹⁶⁰

Despite this clear precedent, courts, from time to time, ignore this time-honored premise in relying on government intention for judging the propriety of speech in a given area.¹⁶¹ In the end, this debate depends on what guideline should determine whether property is compatible with expression: government's intent as property owner or objective factors. One side defers solely to the government's decision and therefore analyzes the government's intention, expressed or otherwise. The better approach assesses a property's compatibility with expression in an objective manner.¹⁶²

159. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

160. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981). See also Irish Subcomm. of Rhode Island Heritage Comm'n v. Rhode Island Heritage Comm'n., 646 F. Supp. 347, 353 (D. RI. 1986) (government cannot transform status of traditional public forum). A well established doctrine, the government cannot be permitted to "transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, 461 U.S. at 180. "[As] it cannot rightly be said that all such forums are equal." *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997).

161. *E.g.*, *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749 (6th Cir. 2004) (holding walkways leading to public school used as polling place are not public forums because government had not expressed such intent in statutes establishing polling places); *Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 549 (2d Cir. 2002) (court's decision ultimately hinged on fact that "the city [had] affirmatively demonstrated intent *not* to treat the Plaza as it would a typical city park," despite area's physical similarity to public park).

162. An approach based on government intent is necessarily circular and self-serving. See *Gey*, *supra* note 28 at 1553 ("Once the public forum issue becomes a matter of

Rather than defer to the government's intent and decision, the court itself should assess whether a piece of property is compatible with speech and do so by analyzing the factors enumerated above (physical characteristics, purpose and nature of property, etc.).

IV. Finding the Traditional on Public College Campus

With these initial considerations, a case can now be made that open accessible areas on a public college campus ought to be considered traditional public fora. Essentially, this section will apply the standard set forth above. Because this standard employs factors that reflect pertinent Supreme Court jurisprudence, its application will not only provide an ideal normative argument but also an argument that is applicable in any circuit court. Before application of this standard though, as a preface, it should be noted that a college campus consists of multiple fora and therefore a court ought to analyze the specific property in question, not the college campus as a whole, under forum analysis. Such property-specific analysis is necessary since a college campus, much like a municipality, contains numerous kinds of property. Therefore, speech in some areas is appropriate, while speech in other areas may not be. This property-specific method best preserves the college administration's ability to educate while acknowledging First Amendment interests. Thus, this section of the article divides the argument for traditional public forum on a college campus into two parts: 1) courts should analyze specific property on a college campus because campuses contain a variety of fora and 2) certain open areas on a college campus are traditional public fora because they are physically similar to other traditional fora, and speech in such areas is compatible with the purpose of colleges.

A. Determining the Appropriate Forum

Most public universities spread across a large area and contain a great diversity of property.¹⁶³ From a football stadium housing tens of

government intent, the answer is usually going to be the same . . .").

163. For example, Ohio State University's main campus covers 1,755 acres of land, including 461 different buildings, "The Oval," a large grassy area with sidewalks used for studying and recreation, "Mirror Lake Hollow," an area containing the historic "Mirror Lake," as well as Browning Amphitheater, and Ohio Stadium, where the Ohio State Buckeyes play football. Available at <http://www.osu.edu>. The University of Michigan's three campuses at Ann Arbor, Dearborn, and Flint total 3,177 acres of land, and 315 buildings. The Ann Arbor campus alone includes various outdoor recreational areas, three different student unions, and many residence halls and academic buildings.

thousands of persons, to a small classroom or administrative office, a college campus opens up areas to the public to varying degrees. Diversity so prevalent, logic demands that a court not label a university in its entirety as either a public or nonpublic forum. In order to obtain the optimum balance between free speech and appropriate governmental control, different types of property within a college confines should be analyzed and treated differently under forum analysis. Both Supreme Court and appellate court jurisprudence require this property-specific approach.

In determining what precise forum to analyze under forum analysis, the Supreme Court has adopted one simple delineating principle: the appropriate forum is that where speakers seek to gain access.¹⁶⁴ If speakers want access to an entire piece of property, then that entire piece should be considered for forum analysis. Likewise, if speakers seek access to a more limited type of forum, then that limited forum is the appropriate forum for analysis. This speaker-centric approach to forum determination is enunciated perhaps most clearly in *Cornelius, supra*, in which a group attempted to gain access to an annual charitable fundraising drive conducted in a federal workplace during work hours.¹⁶⁵ The Court had to define exactly what was the forum under consideration, the federal building or the charitable fundraiser.¹⁶⁶ In selecting the latter as the appropriate forum, the Court relied on precedent and explicitly targeted the access sought by the speaker:

[I]n defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. For example, *Perry Education Assn. v. Perry Local Educators' Assn.*, *supra*, examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs. Similarly, in *Lehman v. City of Shaker Heights*,

Available at <http://www.umich.edu>. The University of Florida sits on an aggregate 2000 acres, with over 900 buildings, of which only approximately 160 hold classrooms and/or laboratories. The campus includes Lake Alice, a sanctuary for alligators, birds, and bats; and the Baughman Meditation Center, a structure for private meditation and public celebration. Available at <http://www.ufl.edu>.

164. See *Cornelius v. NAACP Legal Def. & Educ. Fund Inc.*, 473 U.S. 788, 801 (1985) ("...[I]n defining the forum we have focused on the access sought by the speaker").

165. *Id.* at 790-91.

166. *Id.* at 800-01.

where petitioners sought to compel the city to permit political advertising on city-owned buses, the Court treated the advertising spaces on the buses as the forum. Here, as in *Perry Education Assn.*, respondents seek access to a particular means of communication.¹⁶⁷

This simple formula for defining the relevant forum has guided past and more recent Supreme Court decisions.¹⁶⁸

A speaker-centered approach, such as this, carries with it distinct advantages. First, this approach deals specifically with the issue at bar and avoids delving into matters not properly before the court. The only forum that need be identified is the one where a speaker attempts and is denied access. Moreover, this speaker-centered approach supplies a clear guidepost that shields the court from expanding the controversy in question. For this reason, almost all circuits are in agreement with this principle.¹⁶⁹ As these relevant precedents indicate, courts continually look to the specific property where speakers seek to gain access rather than property in general. In *Cornelius*, the relevant forum was the charitable drive held within a nonpublic forum of a government building.¹⁷⁰ In *Perry*, the court considered an interior mail system again within the nonpublic forum

167. *Id.* at 801 (citations omitted).

168. *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301-02 (1974) (analyzing "car card space" and not public transportation system as whole).

169. *See, e.g.*, *United Food and Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 747 (6th Cir. 2004) ("Appellants here were not seeking general access to the school and private properties involved, but were instead seeking more limited access to the areas surrounding each of the six polling places."); *Summum v. City of Ogden*, 297 F.3d 995, 1001-02 (10th Cir. 2002) ("Identification of the relevant forum requires a nuanced approach that considers (1) the government property to which access is sought and (2) the type of access sought. . . Here, the government property at issue is the lawn of the Ogden City municipal building. The access sought is not merely to converse or post temporary signs on the lawn, but the right to place permanent monuments on the lawn: hence the relevant forum is 'permanent monuments on the lawn of the Ogden City municipal building.'"); *Sons of Confederate Veterans v. Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002) ("The relevant forum is defined by focusing on 'the access sought by the speaker.' Here, the relevant forum is Virginia's special plate program, consisting of the special plates authorized and produced under the general rules established by Va. Code Ann. § 46.2-725. It is to the special plate program that the SCV seek 'access' (here, access without restrictions on their speech within the forum), and special plates authorized for other groups and organizations thus provide the relevant context for analyzing the restriction imposed on the SCV."); *Lebron v. AMTRAK*, 69 F.3d 650, 661 (2d Cir. 1995) ("The relevant forum must be at least advertising space in the rotunda of Penn Station—the means of communication to which Lebron sought access.").

170. *Cornelius*, 473 U.S. at 801.

of a building.¹⁷¹ As these cases reveal, courts must focus upon the specific fora where the speaker attempts access, even if those specific fora exists within a larger nonpublic or public forum.

Air Line Pilots Ass'n, International v. Department of Aviation,¹⁷² a decision from the Seventh Circuit, is directly on point. In this case, a group of pilots sought to place an advertisement honoring pilots in one of the diorama display cases at O'Hare Airport in Chicago.¹⁷³ Significantly, the Supreme Court had previously decided that airports in general are nonpublic fora.¹⁷⁴ Yet, in its analysis, the appellate court first applied the principles espoused in *Cornelius* and looked to what forum the speakers attempted to gain access.¹⁷⁵ Having set forth these basic principles, the court proceeded to apply them to the specific controversy regarding the display case in the airport.¹⁷⁶ The court looked to the speaker's intent to define the relevant forum, and, thus allowed for the possibility that a public forum can exist within a more general nonpublic forum.¹⁷⁷

Consistent with the teaching of *Cornelius*, courts are to analyze the specific property where the speaker seeks to gain access, acknowledging that a variety of fora can exist within a singular governmental property. With this in mind, the specific property

171. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

172. 45 F.3d 1144 (7th Cir. 1995).

173. *Id.* at 1147-48.

174. *See also* *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) (holding airport terminal non-public forum).

175. *Air Line Pilots*, 45 F.3d at 1148. "The relevant forum is defined by focusing on 'the access sought by the speaker.' If a speaker seeks 'general access' to an entire piece of public property, then that property is the relevant forum. If a speaker seeks a more limited access, however, then we must tailor our approach to ascertain 'the perimeters of a forum within the confines of government property.'" *Id.* at 1151 (citations omitted).

176. *Id.* at 1151-52. "Here, the ALPA seeks access to a diorama display case. That organization *does not* desire to use the greater airport concourse for purposes such as solicitation and the distribution of literature. . . . Instead, it wishes only to use one of the display cases to communicate its message. The limited nature of the ALPA's desired access renders the display case the relevant forum for the purpose of constitutional inquiry." *Id.* (citation omitted).

177. *Id.* at 1152. Rather than leave this conclusion implicit, the Seventh Circuit goes on to state that *Cornelius* demands specific property be analyzed even if that property is located within a more general type of forum: "*Cornelius* teaches that forum analysis involves something more than locating the government's broad property interest. Even given a conclusion that a piece of government property is not a public forum, channels for public communication—or alternative fora—may well exist *within* the greater piece of government property. This much is true here. Because the ALPA sought access to the advertising space and not to the airport as a whole, the advertising space is the proper focus of forum analysis." *Id.* (citations omitted).

sought by a speaker on a college campus ought to be analyzed for forum status rather than the college campus as a whole. On one scale, small classrooms and administrative buildings are open only to certain students and administrators, because these areas have certain goals that cannot be achieved in the presence of public access. But on the other end of the spectrum, roads, large parks, and gathering areas often litter and run throughout a college campus. The public has continual access to these open areas at all times, and in fact, the university encourages individuals to gather and relax in the open air. Somewhere in the middle, there exists areas like cafeterias, auditoriums, and athletic fields where the school allows some public access and encourages some public expression, but also limits other forms of expression. Much like a small city, college campuses cater to a variety of pursuits including education, relaxation, athletic completion, and commercial business, among others. Along this line, a judge in the Eleventh Circuit Court of Appeals makes an astute observation, commenting on the inherent variety within public college campuses:

A campus of a major state university is a microcosm of the community, and, as such, contains a variety of fora. Some places on campus, such as the administration building or the president's office, are not opened as fora for use by the student body, and may be best described as nonpublic fora. Other places on campus, such as the residence halls and fraternity and sorority houses, have been created to allow student expression, but remain limited for use by certain groups or for the discussion of certain subjects; these places may be best described as limited public fora. Other places on campus, such as the campus student union, streets, sidewalks, and park-like areas, are freely used for student expression. These areas are best described as traditional public fora. . . .¹⁷⁸

The logic is undeniable.¹⁷⁹ Given this great diversity, in terms of

178. *Ala. Student Party v. Student Gov't Ass'n*, 867 F.2d 1344, 1354 n.6 (11th Cir. 1989) (Tjoflat, J., dissenting). In *Alabama Student Party*, students sued a student government association, claiming that restrictions on election campaigning violated constitutional rights to free speech. *Id.* at 1345. The majority held that the proper analysis centers on the level of control a university may exert over the school-related activities of its students. *Id.* at 1347. Under such reasoning, the court found the narrow restrictions in this case reasonable given the university's interest in education and minimizing the disruptive effects of campus campaigning. *Id.* Thus, the ruling in no way disputes Judge Tjoflat's analysis of multiple fora on a college campus. See Davis, *supra* note 6 at 271 n. 28 (citing Judge Tjoflat for proposition that college campus contains variety of fora).

179. Rod Smolla, Dean of Richmond School of Law, and renowned scholar on free speech, concurs. See Rodney Smolla, *Academic Freedom, Hate Speech, and the Idea of a*

the nature and purpose of property on campuses, there are a variety of different kinds of fora within a college campus.¹⁸⁰ In applying the speaker-intent principle to define the relevant forum, courts review the specific parcel of campus property where a given speaker seeks to gain access, not the general campus as a whole. Just as a federal building and an airport can contain a diversity of fora,¹⁸¹ then a campus spreading over numerous acres, containing buildings and fields and areas for multiple purposes, should be similarly broken down into a variety of fora for forum analysis.

Policy considerations also support this forum analysis. In fact, the only way to avoid either massive under-protection or over-protection of free speech is to adopt a property specific analysis. Certain areas on a college campus often contain traditional public fora. City streets, for example, frequently pass through the middle of large public universities. College administrators cannot close down such areas from outside use for any or every reason. And the allowance for speech in such areas in no way hinders the university from achieving its educational purpose. Obviously, a school must maintain peace and order in certain areas to effectively achieve the educational purpose of the university. Areas, such as classrooms, must necessarily be restricted in order to create a conducive learning environment. Nevertheless, the best way to balance the competing values involved is to analyze different types of property found on a college campus differently. Under this flexible and more reasonable approach, courts can craft a policy that achieves the optimum balance between First Amendment values and important, legitimate goals of the university.¹⁸²

University, 53 LAW & CONTEMP. PROBS. 195, 218 (1990) ("The soundest view is to treat campus not as one unified forum, but as subdivided into multiple forums to which different free speech standards apply").

180. See also Langhauser, *supra* note 6, a recent article written by General Counsel for Maine Community College Systems, and copyrighted by National Association of College and University Attorneys, discussing the forum status of different areas on public college campuses. In the body of this article, Mr. Langhove engages in forum analysis, and specifically acknowledges the existence of traditional public fora, among other fora, on public college campuses. *Id.* at 497, 512.

181. See *Lee*, 505 U.S. at 693 (saying "airport corridors and shopping areas outside of the passenger security zones" are public forums); *Grace*, 461 U.S. at 178-79 (noting the courthouse is made up of various forums).

182. Because accessible areas on college campus, like other public sidewalks and parks, are open to the public and are public thoroughfares, the cost of allowing speech in such areas is low. The possibility of interference or disruptions is slight due to the physical qualities of such areas (openness). Moreover, the cost of preventing such speech is extraordinarily high because numerous people travel in those areas, and these areas

This balanced approach has been recognized within the realm of hospitals. Hospital grounds are similar to college campuses in that the former contains property of varying character from an emergency room to an outdoor parking lot. In *Dallas Ass'n of Community Organizations for Reform Now v. Dallas*,¹⁸³ the Fifth Circuit Court of Appeals held that a hospital could not prevent all solicitation on all of its property.¹⁸⁴ Rather than take a blanket approach, the court took a reasoned stance and avoided labeling all of the hospital grounds as one type of forum:

Our concern in the present controversy has been and remains the necessity of preventing disruptive activity in the crowded front lobby of Parkland, the waiting room, the outpatient clinic, and the emergency treatment area, as well as any other area for patient treatment. However, we also recognize that Parkland's premises cover 23 acres, including over 1,000 feet of sidewalks and several large parking lots. Thus we must attempt to find the middle way between absolute prohibition of free speech activities in a limited public forum, and disruptive expressions that interfere with the purpose, function and administration of a hospital.¹⁸⁵

Such reasoning applies equally to a college campus. Like large hospitals, college campuses often contain various kinds of property over many acres including sidewalks and parks. The imposition of a blanket rule on the totality of either hospital or college grounds ignores the inherent diversity within those areas. In the same way that an emergency room is not the proper place for expressive activities, a classroom setting does not allow for any and all forms of speech. However, a sidewalk on either hospital or campus grounds can easily accommodate free speech with no detrimental impact on the uses of the college or hospital.

The Court of Appeals for the District of Columbia adopted a similar analysis in judging certain sidewalks at the Vietnam War

represent one of the few places that speakers can reach college audiences. If a court labels an entire campus as a nonpublic forum, then these areas so conducive to free speech will lie fallow and underused. The student body will suffer since they will not be exposed to various ideas. Additionally, the speakers who attempt to convey a message will suffer since they will bear a needless burden. The potential costs for all parties concerned are great. On the other hand, courts should and could not brand an entire campus as a traditional public forum.

183. 670 F.2d 629 (Former 5th Cir. 1982), *cert. denied*, 459 U.S. 1052 (1982).

184. *Id.* at 631.

185. *Id.*

Memorial as traditional public forums in *Henderson v. Lujan*.¹⁸⁶ Therein, the court distinguished between sidewalks and “curvilinear paths leading to the Memorial wall; their evidently more specialized use may outweigh the attributes that would otherwise mark them as public forums.”¹⁸⁷ Rather than take the Vietnam War Memorial as a whole and labeling all property thereon as a public forum merely because the government owned the Memorial, the court analyzed the specialized purpose and nature of specific property within that Memorial.¹⁸⁸

College campuses, memorial parks, hospital grounds, and like venues cover significant space and contain a diversity of kinds of property. An all-encompassing blanket analysis of a college campus refuses to recognize this blatant fact, and thereby, excessively undervalues either First Amendment values or the policy goals of the university.

Such values and goals can be achieved generally as long as courts adopt clear objective criteria to determine the nature of a forum.¹⁸⁹ The employment of objective criteria – physical similarity and the compatibility of speech with the property – inevitably permits the various types of property found on the college campuses to fulfill their respective purposes at all times with clarity that would naturally flow for those purposes.

B. Open areas of university property are traditional public fora

The rationale and precedent for defining a traditional public forum have already been set forth previously in this article. The same rationale applies in the university context. To a large extent, objective and physical characteristics dictate the analysis regardless of location. While property may vary to the extent that it is open to the public or is a thoroughfare, these concerns are not tied to such being found on a college campus.

Other factors that implicate whether property is compatible with speech do present unique variables in a college environment, however. Therefore, this section will assume that the college property

186. 964 F.2d 1179 (D.C. Cir. 1992).

187. *Id.* at 1182.

188. *Id.*

189. Indeed, deference to the subjective intent of the government creates an untenable situation. While the government retains the power to plan and control the property as they desire, speakers are left at the mercy of the government and thus are often unaware if they can or cannot speak.

in consideration satisfies an initial barrier of physical characteristics,¹⁹⁰ and proceed to analyze certain factors pertaining to compatibility.

The primary purpose of a university or college is generally compatible with expressive speech activity. On its face, universities serve to educate those students who attend, and such higher education best flourishes in an environment of various ideas. There can be little doubt that many ideas and theories have once been relegated to minority or disfavored status, but through free and open debate on college campuses, gained greater acceptance.¹⁹¹ Accordingly, the Supreme Court has explicitly emphasized that colleges and universities are locations where free speech must receive protections against governmental restriction.¹⁹² Lower courts have followed this lead.¹⁹³

190. A barrier that is easily cleared on a typical college campus. *See, e.g.,* Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 338 (W.D. Va. 1987) (holding that lawn on college campus is public forum because of similarity to municipal park).

191. As Derek Langhove, General Counsel for Maine Community College System, notes in his article, "the culture of free ideological exchange is deeply imbedded in the collegiate setting." Langhove, *supra* note 6, at 482-83.

192. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); Widmar v. Vincent, 454 U.S. 263, 268 (1981) ("Moreover, the capacity of a group or individual to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students."); Healy v. James, 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (quotation marks and citation omitted); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

193. *See, e.g.,* Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072, 1076 (M.D. Ala. 1988) ("[T]his Court can think of no place that should be more hospitable to the free expression of ideas than the campus of a great university").

Of course, the importance of maintaining an environment of free expression on a college campus does not mean an administration is required to refrain from regulating speech on its campus.¹⁹⁴ But any such restriction must be appropriate in light of the purpose of a given piece of property. While some areas on a college campus are not compatible with free public expression, speech in other areas does not interfere with the educative purpose of the university. In these areas – spaces that are compatible with expression – courts should allow as much free speech as possible in order to ensure an environment where no authoritarian party, even the university administration, can suppress speech because of its content. Higher academia's compatibility with speech easily differs from that of a military purpose or even a medical purpose. If free speech is allowed to roam in certain areas of a hospital complex,¹⁹⁵ then surely free speech should be allowed within a college campus whose sole purpose is to expose students to new ideas. The very educational purpose of the university supports the allowance of free speech and the free discussion of ideas. Freedom of speech, thusly, is an essential component of a conducive learning environment. And precisely because of the unique nature of the college environment, and the important speech interests involved, protection of speech must be given considerable weight in the university environment.¹⁹⁶

Directly tied to this recognition of the great value of free speech in a university setting is the parallel notion that such importance is founded on history and tradition. As soon as the university had its inception, it has served as the leading edge for many ideas unpopular in other areas of society.¹⁹⁷ This historical significance of free speech

194. Even in a traditional public forum, time, place, and manner regulations are suitable. See *Widmar*, 454 U.S. at 268 (“First Amendment rights must be analyzed in light of the special characteristics of the school environment. We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”) (quotation marks and citation omitted).

195. *Dallas Ass’n*, 670 F.2d at 632.

196. This concept is understood in the university community. Mr. Langhove, counsel for a public university system, makes this initial observation in his article: “With their essential purpose being to inspire the exchange of new and challenging ideas, public colleges and universities are precisely the type of marketplaces that the Framers had in mind when they committed the nation to protecting both the process and the product of free speech under the First and Fourteenth Amendments.” Langhove, *supra* note 6, at 481.

197. See generally Jeffrey S. Strauss, *Dangerous Thoughts?: Academic Freedom, Free*

on a college campus was recognized by the Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁹⁸ a case in which the university administration refused to pay a third-party contractor for the printing costs of a student publication.¹⁹⁹ Justice Kennedy, speaking for the Court, struck down such refusal and based his analysis partly on the historic place of free speech in a university setting.²⁰⁰

Thus, *Rosenberger* stands for the clear proposition that campuses are an area historically devoted to and dependant on the free expression of ideas. When the historic record is combined with the general compatibility of a university with free speech, a great weight is placed on a court to analyze a specific piece of property on a college campus. These general factors do not make every kind of property on campus a traditional public forum *per se*, but they do support the endorsement of traditional public fora on campus that demonstrate compatibility with public expression.²⁰¹

Speech, and Censorship Revisited in a Post-September 11th America, 15 WASH. U. J.L. & POL'Y 343, 351 (2004) (arguing that "marketplace of ideas" contemplates views that modify or reject traditional beliefs).

198. 515 U.S. 819 (1995).

199. *Id.* at 827.

200. Justice Kennedy elaborates:

Vital First Amendment speech principles are at stake here. . . [including] the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."

Id. at 835-36 (citations omitted). See Davis, *supra* note 6, at 275 (author concludes that historical background of American public university, as described by Justice Kennedy, serves as prerequisite to recognition of traditional public forum).

201. See Juliane N. McDonald, *Brister v. Faulkner and the Clash of Free Speech and Good Order on the College Campus*, 28 J.C. & U.L. 467, 491 (2002) (opines that Supreme Court's recognition of importance of free speech on open areas of public universities makes such areas "prototypical" public forums).

V. Standing Up for the Traditional

A final stumbling block to any argument for traditional public fora on a public college campus comes from *Widmar v. Vincent*.²⁰² Perhaps, more than any other, university administrators cling to this particular case as justification for extensive power to control free speech on a college campus.²⁰³ Accordingly, any objections stemming from *Widmar* must play a significant role in forum analysis litigation within the college setting.

Despite the frequency that college administrators rely on *Widmar*, this reliance is terribly misplaced. *Widmar* cannot be understood (at least not properly) to deny the presence of traditional public fora on a university campus. To the contrary, a proper reading of *Widmar* represents a precedent for, not a stumbling block against, robust free speech on open areas of a college campus. The case requires the recognition of all types of fora within a university setting.

In *Widmar*, university students belonging to a religious group were informed by the University of Missouri at Kansas City officials that they could no longer meet in university buildings.²⁰⁴ The Court held that the university inappropriately discriminated against student groups based on their desire to use a generally open forum to engage in religious worship and discussion.²⁰⁵ Because the student group was religious in nature, much of the Court's analysis discussed the establishment clause.²⁰⁶ Nevertheless, the Court did speak to the question of the appropriate forum label within the university setting.²⁰⁷

Some have taken the language and analysis of *Widmar* to stand for the proposition that no area on a college campus is a traditional public forum.²⁰⁸ However, *Widmar* does not adopt this narrow

202. *Widmar*, 454 U.S. 263.

203. Favored language extrapolated from *Widmar* includes the quote, "First Amendment rights must be analyzed in 'light of the special characteristics of the school environment' . . . A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 268 n.5 (citation omitted).

204. *Id.* at 265.

205. *Id.* at 277.

206. *Id.* at 271-76.

207. *Id.* at 269-70.

208. Such wayward thought includes the Court of Appeals for the Fourth Circuit in *Mote*, 423 F.3d 438. Citing *Widmar*, the appellate court dismissed out of hand that the outside areas on campus could be deemed traditional public fora. *Id.* at 444. This same distorted reasoning was applied by a district court in Texas. See *Bourgault*, 316 F. Supp.

approach. Far from it, the language of *Widmar* acknowledges that some areas on a public university campus are a traditional public forum. The relevant language from *Widmar* comes from *dictum* in a footnote:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make *all* of its facilities equally available to students and nonstudents alike, or that a university must grant free access to *all* of its grounds or buildings.²⁰⁹

From this *dictum*, an argument has been pursued that no public forum exists on a public university campus. Yet, this is not what the Court has said. As the emphasized words in the above quote clarify, Justice Powell understands that the Supreme Court has refused to open up "all" areas of a college campus as a public forum. But by employing such verbiage, the Supreme Court also explicitly refuses to label an entire campus as one type of forum, acknowledging a variety of fora on the grounds. Thus, by strong implication, the Court notes that some (but not "all") of the fora must "grant free access" and be "equally available to students and nonstudents alike."²¹⁰

Further, authorities clarifying the import of *Widmar* point toward the more sensible reading of the case. In *Students Against Apartheid Coalition v. O'Neil*, for example, the court specifically cited *Widmar* to support the fact that a certain area on campus is a public forum.²¹¹ Similarly, the Court of Appeals for the Fifth Circuit has also been unwilling to label an entire campus as a nonpublic forum. Instead, in *Brister v. Faulkner*,²¹² the Fifth Circuit analyzed the specific venue in question and its characteristics to determine that a sidewalk

2d at 419 (interprets *Widmar* as supporting assertion that no portion of public university campus can qualify as traditional public forum).

209. *Widmar*, 454 U.S. at 268 n.5 (emphasis added).

210. *Id.*

211. *O'Neil*, 660 F. Supp. at 338. The Court remarks, "Mindful of . . . the similarity between an open campus lawn and a traditional public forum like municipal parks, *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981), the court will examine the defendant's regulations in light of the cases that concern attempts to regulate speech in public places." *Id.*

212. 214 F.3d 675 (5th Cir. 2000).

on university property classifies as a traditional public forum.²¹³

Thus, as these cases demonstrate, courts have been unwilling impose a blanket rule that all parts of college campuses are nonpublic fora.²¹⁴ Consequently, these cases likewise demonstrate the refusal of courts to read *Widmar* in such a way as to limit fora on campus to nonpublic and limited public forums. Instead, courts often analyze the specific property in question in regards to its purpose and nature to make its forum determination accordingly. Within that analysis, *Widmar* can only stand for the proposition that some areas on a college campus are traditional public fora. Thus, school administrators are unable to rely on *Widmar* as justification for extreme discretion over the allowance of speech on an entire college campus. Such justification does not fit with the language of *Widmar* itself or subsequent judicial understandings of that case.

VI. Conclusion

Truly, “protecting the free exchange of ideas within our schools is of profound importance in promoting an open society.”²¹⁵ For this reason, the university environment, with its focus on learning and knowledge, should serve as bastion par excellence for freedom of speech and expression. Allowance of free speech within the open and accessible areas on campus does not threaten the effectiveness of the university; quite the opposite, it ensures the exposure of students and faculty to a diversity of ideas. If speech is subject to restriction on campus, forum analysis cannot be used to rubberstamp decisions of the university as regulator. Rather – the courts as protectors of the First Amendment – must make forum analysis depend on certain objective characteristics instead of governmental intent. In merely acknowledging the obvious, open accessible areas that look like traditional public fora, act like traditional public fora, and function like traditional public fora, must be considered traditional public fora. Neither government in the form of an external entity nor university administration ought to be empowered to restrict speech in such venues unless it is deemed necessary to fulfill the educative purpose of the university. Just like one should recognize a duck as a duck, proper forum analysis demands the recognition of open areas of a college campus as traditional public fora.

213. *Id.* at 682-83.

214. See discussion *supra*, regarding variety of fora on public college campus.

215. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 296 (1984) (Brennan, J., dissenting).

* * *